

Request for Public Comments on Select Terms Under the Marine Mammal Protection Act in Regard to Sea Otters

Background - In 1972, Congress passed the Marine Mammal Protection Act (MMPA), at 16 U.S.C. §§ 1361-1407, which provides for a moratorium on the taking and importation of marine mammals and marine mammal products. "Taking" is defined broadly in the MMPA to include actual or attempted harassing, hunting, capturing, and killing [16 U.S.C. § 1362(12)].

While Congress' overriding purpose in enacting the MMPA was to ensure marine mammals, such as sea otters, continue to be a functioning part of the marine environment, Congress also provided an exemption for Alaska Native peoples to take marine mammals for the purpose of subsistence or for creating and selling authentic Native articles of handicrafts and clothing. Specifically, in passing the MMPA, Congress created an exemption for the taking of any marine mammal by any Indian, Aleut, or Eskimo who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean if such taking -

- (1) is for subsistence purposes; or
- (2) is done for purposes of creating and selling authentic native articles of handicrafts and clothing: Provided, That only authentic native articles of handicrafts and clothing may be sold in interstate commerce: And provided further, That any edible portion of marine mammals may be sold in native villages and towns in Alaska or for native consumption. For the purposes of this subsection, the term "authentic native articles of handicrafts and clothing" means items composed wholly or in some significant respect of natural materials, and which are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or other mass copying devices. Traditional native handicrafts include, but are not limited to weaving, carving, stitching, sewing, lacing, beading, drawing, and painting; and
- (3) in each case, is not accomplished in a wasteful manner. [16 U.S.C. § 1371(b)].

Efforts to add the exemption to the MMPA were led by U.S. Senator Ted Stevens. Senator Stevens sought to protect a traditional way of life, and the purpose of his amendment was to preserve "the right of Alaska Natives to manufacture and sell in interstate commerce handmade Native arts, crafts, and clothing" (118 Cong. Rec. 22221 (1972)). Senator Stevens described Alaska Native handicrafts in terms of finished goods exhibiting a high degree of workmanship and skill, and stated that he wanted to protect the right of Native peoples to continue their centuries-old way of life and the chosen trade of their forefathers. He spoke of the importance of preserving traditional Native lifestyles: "We have sought a solution that would protect the mammals, yet not wipe out the Eskimo culture and several important Native handicraft activities in the process" [118 Cong. Rec. 8,400 (1972)]. Accordingly, the U.S. Fish and Wildlife Service (Service) understands and is implementing the MMPA consistent with the balance between conservation and human use called for under the statute, to ensure the conservation of the species while recognizing the subsistence needs of Alaska Natives.

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In regulations implementing the MMPA, the Service defines the phrase “authentic native articles of handicrafts and clothing” as: “items made by an Indian, Aleut, or Eskimo that (a) are composed wholly or in some significant respect of natural materials and (b) are significantly altered from their natural form and are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or similar mass copying devices. Improved methods of production utilizing modern implements such as sewing machines or modern techniques at a tannery registered pursuant to § 18.23(c) may be used so long as no large-scale mass-production industry results. Traditional native handicrafts include, but are not limited to, weaving, carving, stitching, sewing, lacing, beading, drawing, and painting. The formation of traditional native groups, such as cooperatives, is permitted so long as no large-scale mass production results” [50 C.F.R. § 18.3].

The Service often receives questions about how we interpret and apply the MMPA and our associated regulations in regard to the MMPA’s exemption for Alaska Natives. The greatest number of questions and concerns are focused on the production and sale of handicrafts and clothing from sea otters. Specifically, we have been asked by the Alaska Native hunters, handicrafters, and others to provide clarification on three terms: “significantly altered from their natural form;” “dwells on the coast;” and “mass production” as used in the MMPA and the Service’s implementing regulations.

To address these questions, we recently undertook several actions to more fully understand the issues and concerns of the regulated public, including: soliciting written and oral feedback from Alaska Native peoples on particular areas of concern; attending numerous public meetings and symposia that provided opportunities for the public, including representatives of commercial and recreational fishing interests, conservation and tourism interests, and scientific /research groups, to voice their opinions and concerns; and co-sponsoring a workshop to hear directly from Alaska Native hunters and handicrafters whose livelihoods involve and/or rely on sea otters. Using that input, as well as input received from interested state and federal agencies, non-governmental organizations (NGOs), and Service staff with many years of on-the-ground experience, we drafted language to clarify our interpretation of these three terms, as set forth later in this document. We emphasize that this language does not change the existing law or regulations. Rather, it merely provides a clarification of these terms for the public. We invite input from all interested parties on this draft interpretation, and provide further instructions as to how to do so below.

We acknowledge that some parties are concerned that the take of sea otters will increase if our clarification of the term “significantly altered” is perceived as being more permissive. We note, however, that clarifying our interpretation of terms used in the MMPA and the regulations is not the appropriate tool to use to manage harvest of sea otter populations. Congress characterized the MMPA exemption for Alaska Natives as allowing the continuation of existing cottage industries of Alaska Natives [H.R. Conf. Rep. No. 92-1488, at 23, 92D Cong. 2d Session (1972)]. Congress also gave the Secretary the authority under the MMPA, upon a finding that marine mammal species or stocks are depleted, to prescribe regulations concerning takings of those stocks by Alaska Natives [16 U.S.C. § 1371(b)]. In other words, even though an exemption exists for take for subsistence purposes or creating and selling authentic Native

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articles of handicrafts and clothing, the Secretary is authorized to promulgate regulations restricting such takings for depleted marine mammal species or stocks.

Status of Sea Otter Stocks in Alaska - There are three stocks of northern sea otters (*Enhydra lutris kenyoni*) in Alaska - southwest, southcentral, and southeast. The southwest stock is listed as threatened under the Endangered Species Act and is considered depleted under the MMPA. The Service is currently finalizing the Recovery Plan for this stock. We will continue to monitor population size, trend, and harvest levels of this depleted stock to ensure that Native take is not limiting recovery. The current estimate of population size is about 55,000 sea otters.

The current population estimate for the southcentral stock is about 18,000 sea otters. The overall trend in abundance for this stock appears to be increasing. Sea otter numbers in Kachemak Bay have increased between 2002 and 2008 at an annual rate of about 26 percent a year. Numbers in western Prince William Sound from 1993 to 2009 showed an average annual rate of increase of about 2.6 percent, strong evidence of a trajectory toward recovery after the *Exxon Valdez* oil spill.

The southeast stock of sea otters is recovering from extirpation at the turn of the 20th Century. The Service estimates this population to be at about 25,000 individuals with growth rates ranging between 12 to 14 percent per year across the stock. The population is still actively expanding into unoccupied habitat and we are working to determine its optimum sustainable population and the carrying capacity of the habitat for this species.

In light of this information, we are seeking input on the draft document provided below, dated March 1, 2013. This draft document seeks to clarify three terms: “dwells on the coast”; “large-scale mass production”; and “significantly altered from its natural form.” Because the “significantly altered” question has historically been the source of the greatest confusion, we are particularly interested in receiving comments that would enlighten the discussion about how to describe/determine whether an item made from sea otter is significantly altered or not.

Draft Clarification of Select Terms Under the Marine Mammal Protection Act in Regard to Sea Otters

The Marine Mammal Protection Act (MMPA) prohibits the take of marine mammals with certain exemptions. One such exemption exists for Alaska Natives who take marine mammals for the purpose of subsistence or for creating and selling authentic native articles of handicrafts and clothing. The U.S. Fish and Wildlife Service (Service) is seeking to clarify three terms used in the MMPA and implementing regulations (50 CFR Part 18) to reduce confusion about this exemption. The focus of this clarification is on sea otters due to the large number of questions the Service receives on this issue.

We invite your comments on this draft document. If you need more information or would like to provide comments, please contact the U.S. Fish and Wildlife Service Sea Otter Program, by electronic mail at (fw7_sea_otter_clarification@fws.gov) or by mail at the U.S. Fish and Wildlife Service, Marine Mammals Management Office, 1011 East Tudor Road, MS-341, Anchorage, Alaska 99503.

The Service anticipates moving forward with finalizing the guidance in the next several months. Please provide your comments to the email or postal address above by the close of business on May 17, 2013.

1. ***Dwells on the Coast.***-Dwells on the coast refers to residing in Alaska and living permanently in an area or community that is adjacent to waters that are tidally influenced or in an area commonly inhabited and used by marine mammals.
2. ***Large-scale Mass Production.***-Large-scale mass production refers to the use of mass copying devices such as pantographs, multiple carvers, embroidery machines, cutting presses, stencils, transfers, stamps, and/or the use of assembly line production. The formation of traditional Native groups or cooperatives and the use of modern implements such as sewing machines are permitted. However, there can be no manufacturing on a large-scale by means of extensive mechanization or division of labor, such as using a standardized pattern on a large-scale.
3. ***Significantly Altered From Their Natural Form.***
 - a. In order to be considered significantly altered from its natural form, a tanned, dried, cured, or preserved part of a sea otter hide, devoid only of the head, feet, and tail (i.e., blocked), or any other remaining parts of the hide, must be substantially changed through means including, but not limited to: weaving, carving, stitching, sewing, lacing, beading, drawing, painting, or other handicrafting methods. Examples of significantly altered items include those items typically known as: mitten; hats; neck

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rolls; gloves; mukluks; purses; and blankets or scarves made from a hide or pieces of hide with a backing or lining and stitched around the edges.

- b. Items will not be considered significantly altered from their natural form where merely minimal changes have been made to a hide devoid only of the head, feet, and tail (i.e., blocked), and where those items can be easily converted back to an unaltered piece of hide. Examples of items not considered to be significantly altered include: a cape that consists of a large hide with a single button neck closure; a hide that has been drawn on with a marker; a blanket with a few stitches.